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In The Supreme Court of The United States

OCTOBER TERM, 1932

UNITED STATES OF AMERICA vs. FACTORS & FINANCE COMPANY, INC.	No. 141
UNITED STATES OF AMERICA vs. HENRY PRENTISS & CO., INC.	No. 234
UNITED STATES OF AMERICA vs. MEMPHIS COTTON OIL COMPANY	No. 308

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

The undersigned, attorneys for taxpayers having cases pending in the Court of Claims and in the Bureau of Internal Revenue, involving questions similar to those in the above-named cases, respectfully move this Court for leave to file the subjoined brief as friends of the Court.

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THE OVERPAYMENT OF INCOME AND PROFITS TAXES FOR A GIVEN YEAR IS A SINGLE CAUSE OF ACTION.

During the course of the oral argument before this Court in *United States of America* v *Factors & Finance* Inc., No. 141, the Assistant Attorney General, Mr. Rugg, made a statement to the effect that **claims for refund may be amended after the statute of limitations has run against the filing of a new claim provided the amendments set up no new cause of action.** During the course of the argument of each of the above entitled cases Mr. Rugg urged that the amendment relied on by the taxpayer set up a new cause of action.

We agree with Mr. Rugg's preliminary statement of law to the effect that amendments might be filed prior to action by the Commissioner on the original claims, provided they set up no new cause of action. This is completely analogous to established court procedure. Once jurisdiction is vested in the court, the original declaration or petition may be amended even after the statutory period of limitations has expired for the filing of a new petition, provided the amending petition or declaration sets forth no new cause of action.

The question, therefore, involved in the cases under discussion resolves itself into: what constitutes a cause of action for overpayment of income tax? We submit that **it is the overpayment of the tax for a given year that constitutes the cause of action**—not the method by which it is computed. Precedent clearly shows that the federal income and excess

profits taxes of any taxpayer for any given year constitute but a single cause of action. The ultimate question to be decided by the Commissioner, the Board of Tax Appeals, or the Courts in any federal tax controversey or case is: **how much has the taxpayer overpaid (or underpaid) his tax for the year?**

Section 252 of the Revenue Act of 1918, which is similar to sections of the other acts dealing with claims for refund, provides:

> "That if, upon examination of any return of income made pursuant to this Act * * * it appears that an amount of income, war-profits or excess-profits tax has been paid **in excess of that properly due,** then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of **the excess shall be credited** against any income, war-profits or excess-profits taxes, or installment thereof, then due from the taxpayer under any other return, **and any balance of such excess shall be immediately refunded** to the taxpayer. * * *"

This Court interpreted that section in *Blair* v. *Birkenstock*,, 271 U. S. 348. The question involved was whether a taxpayer was entitled to interest on an overpayment of a quarterly installment of its 1919 income taxes when at the time of the payment of the installment the correct amount of the tax for the year had not been paid. This court decided that there should be no interest on the overpaymentof the installment while there were still outstanding unpaid taxes for the year, saying:

> "Under Sections 250 and 252 of the Act of 1918, there is no provision for a refund to the taxpayer of any excess payment of a quarterly

> installment, when the whole tax for the year has not been paid. Read together, these sections show that the mere overpayment of an installment is treated as a payment on account of the tax which is assessed for that year, and is not a 'tax erroneously or illegally assessed or collected,' within the meaning of the refund provisions of Section 1019 of the Act of 1924, and so is not subject to its provisions regulating the allowance of interest."

This case clearly shows that while there may be an error in the computation of a Federal income or excess profits tax, that error does not give rise to a cause of action upon which a refund may be recovered. It is the **overpayment of the taxes for the year that is the cause of action** and not errors in individual items which are involved in the computation of the tax.

This principle is further emphasized in *Lewis et al* v. *Reynolds*, 204 U. S. 281. The Commissioner had asserted a deficiency in taxes against the plaintiff. The plaintiff paid the additional taxes and filed a claim for refund. The Commissioner found that the plaintiff was entitled to have his net income reduced by the items indicated in the refund claim, but at the same time the Commissioner found other additions to the plaintiff's net income offsetting the reductions conceded. Accordingly, though the statutory period during which the Commissioner could assert a further deficiency in taxes had run, he claimed that he could offset the items of reduction from income by the items that increased the income **because the sole cause of action before the court was the determination of whether there had been an overpayment of the plaintiff's taxes.**

This Court, after citing Section 284 of the Revenue Act of 1926 and Section 322 of the Revenue Act of 1928 adopted the following language of the Circuit Court of Appeals:

> "The above quoted provisions clearly limit refunds to overpayments. **It follows that the ultimate question presented for decision, upon a claim for refund, is whether the taxpayer has overpaid his tax.** This involves a redetermination of the entire tax liability. While no new assessment can be made, after the bar of the statute has fallen, the taxpayer, nevertheless, is not entitled to a refund unless he has overpaid his tax.
>
> "The action to recover on a claim for refund is in the nature of an action for money had and received, and it is incumbent upon the claimant to show that the United States has money which belongs to him."

The Treasury Department and the Bureau of Internal Revenue have themselves ruled that the question involved in any tax case is whether or not the tax has been overpaid. T. D. 3251, 5 C. B. 245; L. O. 1080, 5 C. B. 246; G. C. M. 9800, X-43-5266 (p. 18). See also *Anderson* v. *Farmers' Loan & Trust Company*, 241 Fed. 787, and *Atlanta Casket Co.* v. *Rose*, 22 Fed. (2d) 800.

The Board of Tax Appeals recognizes that there is but one cause of action before it (for any one taxable year) in any proceeding, namely, the correct amount of the tax for the year. *Appeal of Barry*, 1 B. T. A. 156; *Appeal of Hickory Spinning Co.*, 1 B. T. A. 409; *Appeal of Hotel de France*, 1 B. T. A. 28; *Appeal of Magdalena W. DeSabichi*, 4 B. T. A. 445; *Charles C. Coughlin*, 15 B. T. A. 515.

Accordingly, when a taxpayer has sought to amend a petition to the Board, after the expiration of sixty days from the Commissioner's notice of deficiency, the Board has refused to permit him to bring in a different taxable year which would constitute a new cause of action, *Wald* v. *Commission*, 8 B. T. A. 1003, but where no different taxable year is involved, the Board holds that a shift of theory, or reliance upon items of computation not previously mentioned, does not constitute setting up a new cause of action, for the only cause of action is the underpayment (or overpayment) of the year's taxes. In the *Peruna* case, 11 B. T. A. 1180, 1188, the Board said:

> "In determining whether an amendment states a new or different cause of action from that set forth in the original pleading **the nature of the action in general must be considered.** [Citation.] What is the nature of the action in general under the original petition? Can it be questioned that it is **the review by this Board of the final determination of tax deficiency for a certain period and that this, and no more, is asked by the amended petition?**"

See also *Krueger Broughton Lumber Co.*, 18 B. T. A. 1270; *Marion Shainwald Sevier*, 14 B. T. A. 709.

Similarly, when the Commissioner has once obtained jurisdiction of a valid original claim for refund (not a mere caveat) his power to determine an **overpayment**, is not limited to the theory, grounds or items of computation that might be the basis of determining it.

The receipt of the amending claim by the Commissioner is similar to the receipt of an amended

petition on declaration by a court. He may consider the new arguments under his original jurisdiction. (This is, of course, entirely different from cases where the new contentions are never presented to the Commissioner, but raised for the first time before a court, e. g. *U. S. Felt & Tarrant Mfg. Co.* 283 U. S. 269.) As was said in *St. Louis & S. F. R. R. Co.* v. *Loughmiller*, 193 Fed. 689:

> "When the petition, however inaccurately, imperfectly or inartistically drawn, is sufficient in allegations of fact to **show the claim** asserted therein by plaintiff **is based on the statute creating the right of action,** and is brought by the person on whom the statute confers such right, it may be amended at any time, and the amendment will relate back to the date of the institution of the action. [Citing cases.]"

See also *Illinois Surety Co.* v. *U. S.* Fed. 334, 339; 14 Op. A. G. 615.

No new cause of action having been set up by the amendments to the claims, under Mr. Rugg's concession they were properly received and should have been considered in the Commissioner's determinations.

The judgments of the courts below should be affirmed.

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